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SUPREME COURT, U.S.
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In the
Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-440

JOSUE N. SAEZ,
PETITIONER

v.

EUGENE G. GOSLEE, AS ACTING GENERAL COUNSEL AND/OR PETER G. NASH, GENERAL COUNSEL OF THE NATIONAL LABOR RELATIONS BOARD

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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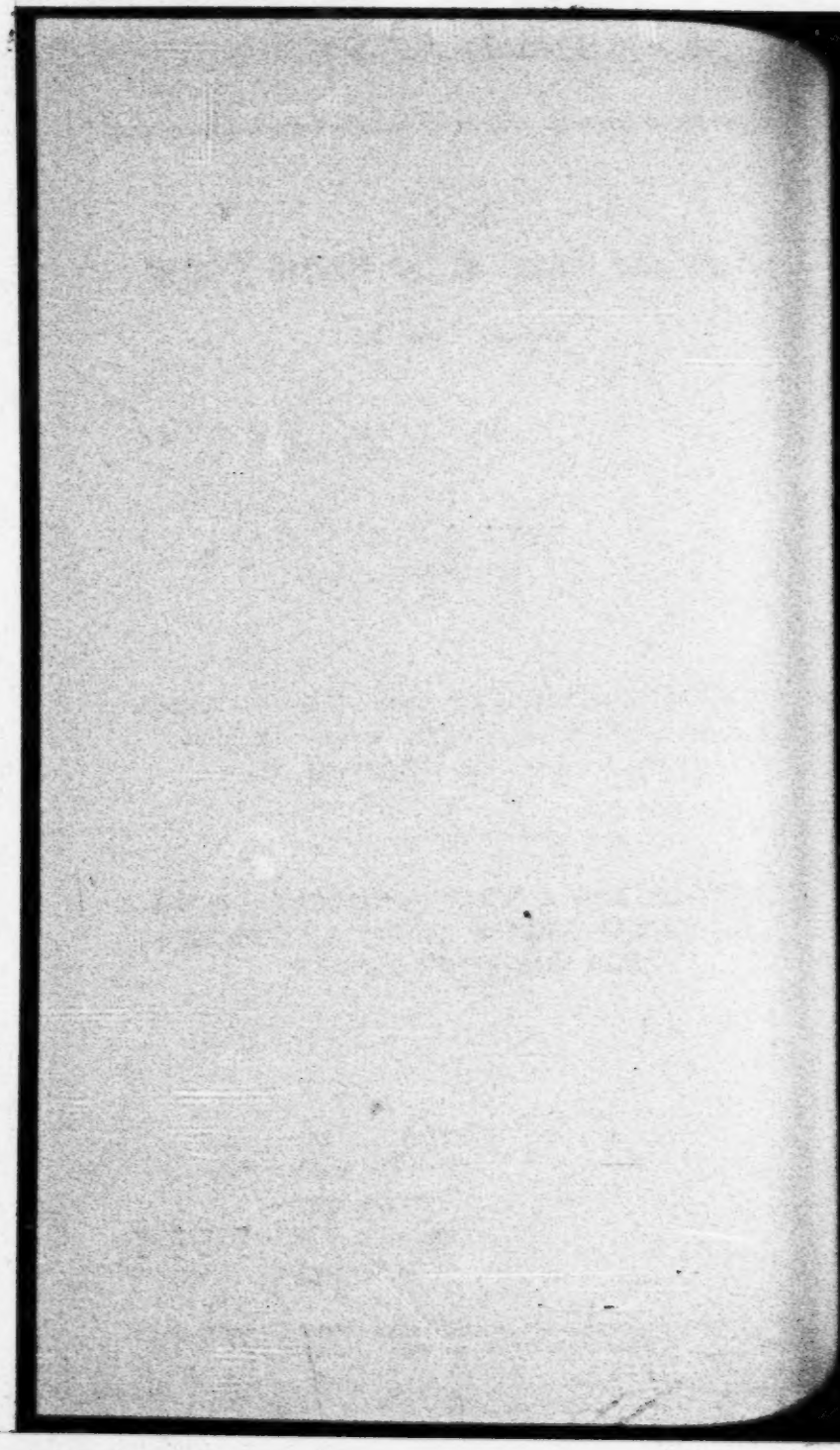

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EUGENE G. GOSLEE, AS ACTING GENERAL COUNSEL AND/OR PETER G. NASH, GENERAL COUNSEL OF THE NATIONAL LABOR RELATIONS BOARD

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

This is a petition for a writ of certiorari to review the decision of the United States Court of Appeals for the First Circuit.

Opinions Below

The opinion of the court of appeals (App. A, *infra*, p. 15) is not yet officially reported. The findings of fact and conclusions of law and judgment of the United States District Court for the district of Puerto Rico (App. B, *infra*, p. 20) are not yet officially reported. The refusal

of the General Counsel of the National Labor Relations Board to issue complaint or grant other relief (App. C, *infra*, p. 26) is unreported.

Jurisdiction

The opinion of the court of appeals (App. A, p. 15) was entered June 21, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

Question Presented

Section 3(d) of the National Labor Relations Act provides that the General Counsel of the National Labor Relations Board "shall have final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints under Section 160 of this title, and in respect of the prosecution of such complaints before the Board." The question is whether the General Counsel's refusal to issue a complaint upon charges filed without first providing a hearing at some stage of his investigation is a denial of procedural due process.

Statute Involved

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151 *et seq.*), are set forth in App. I, *infra*, p. 45.

Statement

A. Proceedings Before the General Counsel

Petitioner, an individual, was employed by Sea-Land Service, Inc., at San Juan, Puerto Rico from October 1, 1969 until February 6, 1971. On the latter date he was discharged

for alleged "poor performance." Shortly prior to his discharge petitioner was actively engaged in organizing fellow employees of Sea-Land on behalf of Office Employees International Union, AFL-CIO. Two days after his discharge, on February 8, 1971, petitioner filed unfair labor practice charges with the regional office of the Board in Santurce, Puerto Rico, alleging his discharge was in violation of sections 8(a)(1) and (3) of the Act.

The charge signed by petitioner was prepared by a Field Examiner of the Board on forms provided by the Board, signed by petitioner, docketed and given a case number. The Field Examiner asked petitioner a number of questions, made notes of his answers, reduced them to narrative form in an affidavit which petitioner was asked to sign and did. Several days later petitioner was called to the regional office and interviewed by a different examiner. Again petitioner was asked a series of questions, notes taken of his answers, paraphrased into narrative form by the field examiner, and petitioner asked to sign the same as an affidavit. On neither occasion, nor subsequently, was petitioner advised of his right to have counsel although the Board's rules so provide (App. G, *infra*, p. 40). Petitioner gave the names of several employees in support of his charge, but they were never called upon by Labor Board representatives. The employer was contacted by the Field Examiner and gave its version of the discharge.

On February 26, 1971, the Regional Director of the Board advised petitioner he was refusing to issue complaint on the grounds the Director had determined the petitioner was a "supervisor" as defined in the Act. (App. G, *infra*, p. 40). Petitioner was also advised that he had a right to appeal this ruling to the General Counsel but admonished this appeal "must contain a complete statement setting forth the facts and reasons upon which it is based." Petitioner retained counsel who filed an appeal with the General

Counsel in which he protested the difficulty of not knowing the facts on which the Regional Director had made his determination and requesting that petitioner be given a hearing. (App. H, *infra*, p. 42). The office of the General Counsel, on April 1, 1971, denied the appeal. (App. C, *infra*, p. 36). In doing so, it purported to set forth the facts upon which it was concluded the petitioner was a "supervisor." The inference being that the facts were culled from the two affidavits given by the petitioner to the field examiners. Having exhausted his administrative remedies, the petitioner brought suit in the United States District Court for the District of Puerto Rico.[1]

B. Proceedings in the District Court

The petitioner brought suit in the District Court under 29 U.S.C. 1277 claiming that as an "employee" under Section 2(3) of the Act he had certain statutory rights which had been denied him by the General Counsel without procedural due process, and sought mandamus to compel the General Counsel to file a complaint or grant an administrative hearing. The General Counsel moved to dismiss on the grounds the court lacked subject matter jurisdiction. The lower court granted this motion while recognizing "the law in this area is in a state of flux."

C. The Decision of the Court of Appeals

The court of appeals, in a per curiam opinion, sustained the lower court, holding that "while there is no provision in the Act explicitly prohibiting judicial review of General Counsel's activities, it must be concluded that jurisdictional abstention has been fully acquiesced in by Congress." The

[1] The facts set forth above were alleged in the complaint and undisputed in the motion to dismiss and are substantially correct.

court held that "it is doubtful that appellant has an 'entitlement' to have an unfair labor practice complaint issue in the same sense that, for example, a welfare recipient has a statutory entitlement to benefits." And granting that appellant might be within the scope of due process protection, "the particular interest he is seeking to protect does not seem to be of a nature serious enough to warrant imposition of a hearing requirement."

Reasons for Granting the Writ

The decision below encroaches upon the rights of employees under the National Labor Relations Act. It deprives employees of procedural due process by allowing one individual, the General Counsel, to determine at his whim or caprice, whether statutory granted rights may be protected.

1. The Right of Employees To Form Labor Organizations and To Bargain Collectively Through Representatives of Their Own Choosing Has Long Been Recognized. *NLRB v. Jones & Laughlin Steel Corporation*, 301 U.S. 1, 33, 34, 57 S.Ct. 615, 81 L.ed. 893, 108 A.L.R. 1352.

This right is protected by the Constitution against governmental infringement, as are the fundamental rights of other individuals. *NLRB* v. *Edward G. Budd Mfg. Co.*, 169 F. 2d 571, 577 (C.A. 1, 1948) and *Goldberg* v. *Kelly*, 397 U.S. 254, 25 L.ed. 2d 287, 90 S.Ct. 1011. Such rights are not private rights vested in the employees but public rights protected by the power placed by the Act in the National Labor Relations Board. *Amalgamated Utility Workers* v. *Consolidated Edison Co.*, 309 U.S. 261, 60 S.Ct. 561, 84 L.ed. 738. Whether a person is entitled to the benefits and protection of the Act as an 'employee' or excluded therefrom as a "supervisor" is initially determined by either the

Labor Board under Section 8 of the Act or the General Counsel under Section 8 of the Act with ultimate review by the courts under Section 10 of the Act.

For the last twenty-five years, since enactment of the Taft-Hartley amendments to the Act, the rights of those protected by the Act are subject to two different interpretations depending on whether the Labor Board makes the determination in a formal proceeding governed by the safeguards of the Administrative Procedures Act or informal investigative action separately taken by the General Counsel of the National Labor Relations Board. The following cases are typical and illustrative of the confusion and conflict which has sprung from such dual workings under the Act.

a. In a representative proceeding, solely within the jurisdiction of the Labor Board, a petition is filed by a labor organization seeking certification. In determining the appropriateness of the bargaining unit, the Labor Board provides for and holds a hearing and takes testimony and evidence of the interested parties (employer and labor organization) in order to make its determination as to which employees, based on their duties, are "supervisors." The Labor Board's determination on this matter is binding on the parties and there is normally no direct appeal to the courts. *AFL v. NLRB*, 308 U.S. 401, 84 L.ed. 347, 60 S.Ct. 300.

b. If the labor organization is certified in the preceding example, the question of the supervisory status of any employee included or excluded from the bargaining unit may, and often does, end in the courts for their final scrutiny by either a petition for enforcement in a subsequent refusal to bargain proceeding filed by the Labor Board, or a petition for review of the Labor Board's order under Section 10 of the Act. *Leedom v. Kyne*, 358 U.S. 184, 187, 79 S.Ct. 180, 3 L.ed. 2d 210, 213.

c. The General Counsel issues a complaint alleging an employee is discharged for protected activities. The employer defends on the grounds the employee is in fact a supervisor. The Labor Board finds the employee is not a supervisor and on appeal the court of appeals sustains the Labor Board. *Red Star Express Lines* v. *NLRB*, 196 F. 2d 78 (C.A. 2, 1952).

d. The General Counsel issues a complaint alleging an employee is discharged for protected activities. After a hearing, the Labor Board agrees. On appeal, the court dismisses finding such person to be in fact a supervisor. *NLRB* v. *Fullerton Publishing Company*, 283 F. 2d 545 (C.A. 9, 1960).

e. The General Counsel issues a complaint alleging A and others were discharged for protected activities. The Labor Board finds that all others but A were discharged for protected activities. On appeal by A, the court holds the Labor Board was correct in determining A (Johnson) was a supervisor. *Johnson* v. *NLRB*, 441 F. 2d 266 (C.A. 6, 1971).

These illustrations have one thing in common. Because of the nature of the proceedings, the supervisory status of the persons involved was reviewed and determined by the courts on a full and complete record. Had this petitioner been involved in any one of these common types of proceedings, his status of "employee" would have been completely aired and determined after a full and complete hearing on the merits. Because of circumstances beyond this petitioner's control, he was denied a hearing of any kind before the Labor Board and review before the courts to assert and protect rights guaranteed by federal statute.

2. The Petition Raises Before the Court an Important Question of Federal Procedure Which Has Not Been, But Should Be, Settled by This Court.

The present problem is a recurring one and will continue to arise until put to rest by this Court. The situation in which petitioner finds himself is not an isolated one. Statistics taken from the Thirty-Fourth Annual Report of the National Labor Relations Board for the fiscal year ended June 30, 1969 reveal: of 12,022 charges filed against employers, 4,376 were filed by individuals; of the 12,022 charges against employers, 6,410 or 53.3% alleged the discriminatory discharge of employees; of the total number of individual charges against employers *closed* (12,404), 4,398 or 35.5% were withdrawn (usually at the request of the regional office) and 4,110 or 33.1% were dismissed before issuance of complaint. It seems reasonable to believe that substantially the same high rate of dismissals has prevailed during each of the last twenty-five years—since passage of the Taft-Hartley amendments—and will continue to prevail.

The court of appeals felt concern that "important governmental interests, both fiscal and otherwise, would be jeopardised should we require a hearing prior to a final decision on whether to issue an unfair labor practice complaint." (App. A, p. 17). This Court was faced with a similar argument in *Goldberg* v. *Kelly*, 397 U.S. 254, 90 S.Ct. 1011, 25 L.ed. 2d 287 and disposed of the same by holding that as a matter of procedural due process the interest of a welfare recipient in the continued payment of welfare payments was sufficiently fundamental to prohibit the termination of those benefits without a prior evidentiary hearing.

3. The Federal Questions Herein Have Not Heretofore Been Specifically Determined by This Court.

The basic question in this case would not seem to have ever come before this Court.

Prior cases before this Court which come closest to presenting a question similar to that in this case would seem to be in *Leedom v. Kyne*, 358 U.S. 184, 187, 79 S.Ct. 180, 3 L.ed. 2d 210, 213, and *Vaca v. Sipes*, 386 U.S. 171, 17 L.ed. 2d 842, 853, 87 S.Ct. 903. While in *Leedom* this Court was concerned with a decision of the Labor Board made in excess of its delegated power and contrary to a specific prohibition in the Act whereby the Labor Board included "professional" employees in a bargaining unit contrary to their desires, it was the "right" which this Court preserved. "It (the Labor Board) deprived the professional employees of a 'right' assured to them by Congress. Surely, in these circumstances, a Federal District Court has jurisdiction of an original suit to prevent deprivation of a right so given."

The same statute which gives professional employees the right to vote for or against inclusion in a bargaining unit with other employees gives employees the protection to join or refrain from joining labor organizations and engaging in other concerted activities.

In logic and reasoning, it seems proper to carry this Court's protection of professional employees' 'right' assured them by Congress to cover the "rights" of petitioner set forth in Section 7 of the Act.

Vaca v. Sipes was cited by the court below to support its proposition that Section 3(d) of the Act has uniformly been interpreted to mean that federal courts have no jurisdiction to review the General Counsel's refusal to issue complaint. While this Court did express the view, in passing, that the General Counsel had unreviewable discretion to refuse to institute an unfair labor practice complaint, such statement was not germane to the issues before the Court—a suit involving an individual's claim against a union for lack of fair representation. In the most recent case where the Court has discussed this issue, again with-

and deciding it, the dissenting opinion of Justice Douglas makes it clear the answer is still forthcoming. *Motor Coach Employees* v. *Lockridge*, (June, 1971) 29 L.ed. 2d 473, 403 U.S. 274, 91 S.Ct. 1909. Said Justice Douglas, "Since we have yet to rule on the reviewability of the refusal of the General Counsel to act, that result might be open although at present the authority is to the contrary. Cox and D. Bok, Labor Law 128 (7th ed., 1969); *General Drivers Local 886* v. *NLRB*, 179 F. 2d 426."

A. Review of This Case Would Enforce a Clear-cut Distinction of the Law.

Each Term petitions for certiorari have been filed during the last fifteen to twenty years by petitioners—like the present one—who feel they have been deprived of substantial due process in seeking affirmation of rights granted individuals by federal statute. And while there is no provision in the Act explicitly prohibiting judicial review of General Counsel's activities, the lower courts have equated a consistent failure to grant relief to mean the federal courts have no jurisdiction to review the General Counsel's refusal. And yet, as we shall demonstrate, the reasoning on which such conclusion is based is neither uniform nor consistent with decisions of this Court with somewhat similar statutes, nor do the various circuits agree that there is no remedy.

A. The Third Circuit first spoke on the matter in 1941 in *Jacobson* v. *NLRB*, 120 F. 2d 96, holding, "The jurisdiction of the courts of appeals to review actions of the National Labor Relations Board is conferred by statute and review of the Board's actions must rest within the statutory power granted to the reviewing courts under Sections 9 and 10 of the Act, 29 U.S.C.A. 159 and 160." (pp. 100). Not only was this conclusion unnecessary for

a determination of the issue before the court, it did not take into consideration the Supreme Court's holding, the year previously, that the "finality" of a Board order would not bar court scrutiny if action by the Board inflicted an injury apart from the review provisions of the Act. *AFL* v. *NLRB*, 308 U.S. 401, 84 L.ed. 347, 60 S.Ct. 300. The First Circuit followed in 1948 in *Lincourt* v. *NLRB*, 170 F. 2d 306, affirming that refusal to issue a complaint was not a "final order" and thus not reviewable under the Act. The Sixth and Tenth Circuits have followed this reasoning. *Dunn* v. *Retail Clerks International Association*, 307 F. 2d 285 (C.A. 6, 1962) and *General Drivers, Chauffeurs and Helpers* v. *NLRB*, 179 F. 2d 492 (C.A. 10, 1950).

B. The Second Circuit, while following the above named Circuits, has carefully indicated that where a plaintiff alleged a property right which was denied by failure of a hearing thus raising a constitutional issue, "If this assertion of constitutional right is not transparently frivolous, it gives the District Court jurisdiction; and, having once acquired jurisdiction, the court might, and should dispose of all other questions which arose, even though they would not have been independently justiciable." *Fay* v. *Denda*, 172 F. 2d 720 (C.A. 2, 1949). In *McLeod* v. *Local 476, United Brotherhood of Industrial Workers*, 288 F. 2d 198 (C.A. 2, 1961), in holding it had no jurisdiction over the Labor Board's discretion, the court discussed two recognized exceptions: if a constitutional issue is raised, i.e., denial of due process, or where the Labor Board acts in direct and conceded violation of the statute. The District of Columbia Circuit has similarly left the judicial door open with the following reservation, "We need not here canvass whether, and if so under what circumstances, a court can correct an abuse of discretion by the General Counsel in failing to issue a complaint." *Hourihan* v. *NLRB*,

201 F. 2d 167 (C.A. D.C. 1952), and *Retail Store Employees Union* v. *Rothman*, 295 F. 2d 330 (C.A. D.C. 1961).

C. The United States District Court for the Western District of Wisconsin, in *Heiser Ready Mix Co.* v. *Fenton*, 49 LRRM (1936) held it had jurisdiction to issue an order requiring the General Counsel to investigate unfair labor practice charges, and if reasonable cause was found to believe such charge to be true, to issue a complaint and petition the federal court for injunctive relief pending determination by the Labor Board. (Reversed on other grounds by the Seventh Circuit, *Heiser Ready Mix Co.* v. *Fenton*, 305 F. 2d 277 (1959)). The United States District Court, S.D. California, relying on *Leedom* v. *Kyne*, 358 U.S. 184, 79 S.Ct. 180, 3 L.ed. 2d 210 (1958) and *Switchmen's Union of North America* v. *National Mediation Board*, 320 U.S. 297, 64 S.Ct. 95, 88 L.ed. 61 (1943), held it had ample authority to assert jurisdiction to order the General Counsel to complete an investigation of charges. *Southern California District Council* v. *Ordman*, 318 F.Supp. 633.

D. This Court's decision in *Leedom* v. *Kyne*, 358 U.S. 184, 3 L.ed. 210, 79 S.Ct. 180 has clearly opened the jurisdictional door to petitioner's suit. While in *Leedom* v. *Kyne* the Court was concerned with a decision of the Labor Board made in excess of its delegated power and contrary to a specific prohibition in the Act whereby the Labor Board included "professional" employees in a suit contrary to the desires of said "professional" employees, it was the "right" which this Court preserved. "It (the Labor Board) deprived the professional employees of a 'right' assured to them by Congress. Surely, in these circumstances, a Federal District Court has jurisdiction of an original suit to prevent deprivation of a right so given." The "right" of petitioner to the protection of the act is no less than that of professional employees and is equally protected by procedural due process.

While the lower court doubted that petitioner had an "entitlement" to have an unfair labor practice complaint issue in the same sense that a welfare recipient had a statutory entitlement to benefits, it seems clear the lower court was drawing an undefined distinction between statutory rights. Surely the statutory rights granted the petitioner have as deep an impact on the protection of his livelihood as the protection of welfare recipients as found in *Goldberg* v. *Kelly*, 397 U.S. 254, 25 L.ed. 2d 287, 90 S.Ct. 1011, and "professional" employees under the Act.

Conclusion

The present case is typical of the all too common practice of the subverting of statutory rights granted employees. While petitioner does not quarrel with a Labor Board determination following a hearing and the statutory procedures granted and guaranteed by the Act and the Administrative Procedure Act, it is quite another matter to allow a final determination of statutory rights to the General Counsel who is answerable to no one nor bound by court or Board decisions. To deny jurisdiction of the federal courts under such circumstances would mean "a sacrifice or obliteration of a right which Congress" has given petitioner for there is no other means of asserting his rights. *Leedom* v. *Kyne* (*Id.* 358 U.S. at 214).

Once a "right" has been granted—and *Leedom* v. *Kyne* has so established—it follows, as argued extensively in petitioner's brief to the lower court,[2] this Court will not allow a deprivation of such right without procedural due process, the fundamental requisite of which is the opportunity to be heard. *Grannis* v. *Ordean*, 234 U.S. 385, 394, 58 L.ed. 1363, 1368, 34 S.Ct. 779; *Armstrong* v. *Manzo*, 380

[2] For the convenience of the Court copies have been filed with the Clerk.

U.S. 545, 552, 14 L.ed. 2d 62, 66, 85 S.Ct. 1187. "The demands of due process do not require a hearing at the initial stage or any particular point or at more than one point in an administrative hearing so long as the requisite hearing is held before the final order becomes effective." *Inland Empire District Council v. Millis*, 325 U.S. 697, 700, 65 S.Ct. 1316, 94 L.ed. 1577; *Goldberg v. Kelly*, supra.

The petition for a writ of certiorari should be granted.

September, 1972
San Juan, Puerto Rico.

Respectfully submitted,

GEORGE L. WARREN and
PEDRO E. PUIGCERVER BUIZ
Attorneys for Petitioner

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 72-1014

JOSUE N. SAEZ,
PLAINTIFF, APPELLANT,
v.
EUGENE G. GOSLEE,
as acting General Counsel and/or
PETER G. NASH, General Counsel of the
National Labor Relations Board,
DEFENDANTS, APPELLEES.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

Before ALDRICH, *Chief Judge*,
McENTEE and COFFIN, *Circuit Judges*.

George L. Wessler, with whom *Pedro E. Purcell Ruiz* was on brief, for appellant.

Stephen J. Solomon, Attorney, with whom *Peter G. Nash*, General Counsel, *Marcel Mallet-Prevost*, Assistant General Counsel, and *Glen M. Bendixen*, Chief of Special Litigation, were on brief, for appellee.

June 21, 1972

PER CURIAM. Plaintiff filed an unfair labor charge against his former employer, alleging that he was discharged because he engaged in protected union activities. After investigation, the Regional Director declined to issue a complaint. Plaintiff then appealed to the General Counsel, who also refused to issue a complaint, stating he had deter-

mined that plaintiff was a supervisor and therefore not protected by the National Labor Relations Act. 29 U.S.C. 152 (11). Plaintiff's administrative appeal having failed, he sought mandamus in the district court to compel General Counsel to file a complaint. He now appeals from the dismissal of that action. We affirm.

Section 3 (d) of the Act gives General Counsel final authority over the investigation and issuance of unfair labor practice complaints. For a quarter of a century this section has been uniformly interpreted to mean that federal courts have no jurisdiction to review the General Counsel's refusal. *Mayer* v. *Ordman*, 6 Cir., 1968, 391 F. 2d 889, *cert. denied* 393 U.S. 925; *Balanyi* v. *Local 1051, IBEW*, 7 Cir., 1967, 374 F. 2d 723; *Hourihan* v. *NLRB*, D.C. Cir., 1952, 201 F. 2d 187, *cert. denied* 345 U.S. 930. See *Vaca* v. *Sipes*, 1967, 386 U.S. 171, 182. Thus, while there is no provision in the Act explicitly prohibiting judicial review of General Counsel's activities, it must be concluded that judicial abstention has been fully acquiesced in by Congress. Indeed, in view of the imposing authority in favor of nonreviewability, this situation seems paradigmatic of one which is "committed to agency discretion" under section 10 of the Administrative Procedure Act. 5 U.S.C. 701 (a) (2). Appellant has alleged no special circumstances that might take his case out of the general rule. This is not a case where the claim is that the General Counsel has violated express statutory requirements, see *Leedom* v. *Kyne*, 1958, 358 U.S. 184; cf. *McKart* v. *United States*, 1969, 395 U.S. 185, but is merely one where appellant and General Counsel are in disagreement over the facts.

Appellant also alleges that he was denied procedural due process. Attacking the constitutional adequacy of the ex parte investigations of the Regional Director and the General Counsel, he asserts he was entitled to a hearing at some point prior to final disposition of his unfair labor practice charge. We see no merit in appellant's constitutional claim.

First, it is doubtful that appellant has an "entitlement" to have an unfair labor practice complaint issue in the same sense that, for example, a welfare recipient has a statutory entitlement to benefits. See *Goldberg* v. *Kelly*, 1970, 397 U.S. 254, 261-62. The remedies of the National Labor Relations Act have generally been construed as protecting public rather than private rights, and thus their invocation has been entrusted to the public agency Congress created to enforce the provisions of the Act. See *Amalgamated Utility Workers v. Consolidated Edison Co.*, 1940, 309 U.S. 261. Second, even granting that appellant may be within the scope of due process protection, the particular interest he is seeking to protect does not seem to be of a nature serious enough to warrant imposition of a hearing requirement. See *Cafeteria & Restaurant Workers Union v. McElroy*, 1961, 367 U.S. 886, 894-97. We cannot equate it with the termination of welfare benefits which may be essential to an individual's continued existence. See *Goldberg v. Kelly, ante* at 264.

Finally, we see important governmental interests, both fiscal and otherwise, that would be jeopardized should we require a hearing prior to a final decision on whether to issue an unfair labor practice complaint. At present the great majority of unfair labor practice cases are disposed of prior to formal hearing at the Board level. A. Cox and D. Bok, *Cases on Labor Law*, p. 138 (7th ed. 1969). To require a hearing in the case before us would be to require some form of hearing for every unfair labor practice charge, placing a significant burden on the resources of the General Counsel's office. Perhaps more important, the informality of pre-Board procedures serves the public interest by promoting the amiable and peaceful settlement of labor disputes. The formalizing effect of a hearing requirement could jeopardize this important governmental

interest. In any event this determination does not reach constitutional levels.

Affirmed.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 72-1014.

JOSUE N. SAEZ,
PLAINTIFF, APPELLANT,
v.
EUGENE G. GOSLEE, ETC., ET AL.,
DEFENDANTS, APPELLEES.

JUDGMENT
Entered June 21, 1972

This cause came on to be heard on appeal from the United States District Court for the District of Puerto Rico, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the District Court is affirmed.

By the Court:
(s) DANA H. GALLUP
Clerk

UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF PUERTO RICO

Civil No. 574-71

JOSUE N. SAEZ,
PLAINTIFF,
v.
EUGENE G. GOSLEE,
as Acting General Counsel and/or
PETER G. NASH, General Counsel
of the National Labor Relations Board,
DEFENDANTS.

JUDGMENT

The Court having entered its Findings of Fact and Conclusions of Law in the above entitled action and pursuant to said opinion entered on December 2, 1971, hereby enters the following judgment:

IT IS HEREBY ORDERED, that defendants' motion to dismiss on the ground that the Court lacks jurisdiction over the subject matter is granted and the requested discovery becomes moot and abates.

IT IS FURTHER ORDERED, that this action is dismissed.

San Juan, Puerto Rico, December 2, 1971.

(s) JOSE V. TOLEDO
U. S. District Judge

APPENDIX B

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO

Civil No. 874-71

JOSUE N. SAEZ,
PLAINTIFF,
v.
EUGENE G. GOSLEE,
as Acting General Counsel of the
National Labor Relations Board,
DEFENDANT.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

On August 6, 1971, plaintiff filed its complaint essentially seeking to compel the General Counsel of the Board to issue an unfair labor practice complaint based on a charge filed with the Regional Director. Defendant moved to dismiss the complaint on the grounds that (1) this Court lacks jurisdiction over the subject matter of the action, and (2) the complaint fails to state a claim on which relief can be granted. Upon full consideration, the Court makes the following:

FINDINGS OF FACT

1—On February 8, 1971, plaintiff filed an unfair labor practice charge in Board Case No. 24-CA2981, with the Board's Regional Office for the Twenty-fourth Region. The charged alleged that on February 6, 1971, Sea-Land Service, Inc., terminated the plaintiff's employment because of his membership and activities in behalf of Local 1402 of Office and Professional Employees International Union, AFL-CIO, in violation of Section 8(a)(1) and (3) of the National Labor Relations Act.

3 — On February 26, 1971, following a full administrative investigation, the Regional Director dismissed plaintiff's charge on the ground that he was a supervisor, not an employee. Thus, the Regional Director advised the plaintiff by letter of February 26, 1971, that "assuming without deciding that you were engaged in union activities and that you were discharged from said activities, the Act does not protect you since supervisors are not included in the definition of 'employees', who have the protection of Section 8(a)(1) and (3) of the Act."

3 — On April 1, 1971, the General Counsel sustained the Regional Director's decision that plaintiff was a supervisor within the meaning of Section 2(11) of the Act. The appeal was denied essentially for the reasons set forth in the Regional Director's letter of February 26, 1971, which considered that the plaintiff, Josue N. Saez, has a supervisory title, as Saez two affidavits, dated February 8, and 17, 1971, disclosed the following: "Plaintiff was in charge of 14 to 16 employees; he determined the number of men to be used; he assigned them to their places of work; he checked the utilities' work; he decided which equipment was serviceable and which needed shop repair; he performed no utility work and limited inspection work; he prepared employee time reports; he authorized some employees to leave without consulting his superior; he transferred a utility man from his gang to another if requested by a supervisor; he issued verbal warnings to employees if they did not perform their job; he rejected unsatisfactory employees; he was replaced by a supervisor when away from work; he attended supervisor meetings; he was paid differently than rank-and-file; he did not punch a time card like the rank-and-file; and he discussed grievances usually with the union steward."

4 — On August 6, 1971, plaintiff filed the complaint in

the instant case seeking, in effect, a writ of mandamus, directing the Board to issue a complaint based on his unfair labor practice charge.

5 — On August 20, 1971, plaintiff served defendant with notices of taking deposition on September 20, 1971, to take the oral testimony of five attorneys and field examiners of the Board's Regional Office.

6 — On September 16, 1971, plaintiff served subpoenas for taking depositions on four of the above representatives of the Regional Office to appear at the scheduled deposition.

7 — On September 17, 1971, defendant served its objection to subpoenas for taking depositions under Rule 45(d) and its motion for a protective order under Rule 26(c) directing that discovery not be had. On the same day, defendant also filed its motion to dismiss the complaint on the ground that this Court lacked jurisdiction over the subject matter of the action.

8 — On September 27, 1971, following defendant's agents' failure to appear at the September 20 deposition, plaintiff served defendant with a motion for Attachment of Witnesses, requesting this Court to issue an order to show cause why the subpoenaed witnesses should not be held in contempt for disobeying the subpoenas. On the same day, the plaintiff filed a motion for Summary Judgment accompanied with a Memorandum of Law in support of said motion, as required by Rule 2 of the Rules of this Court.

9 — On October 15, 1971, the defendant filed his opposition to plaintiff's motion for an Order to Show Cause and in the memorandum in support of said motion, defendant cited the case of *Catalytic Industrial Maintenance Co. v. Raymond J. Compton et als*, Civil No. 567-71, decided on September 29, 1971, by Honorable Judge Fernandez Badillo in the District Court of Puerto Rico.

CONCLUSIONS OF LAW

Section 3(d) of the National Labor Relations Act, (29 U.S.C.A. § 153(d), provides that the General Counsel of the Board ... shall have final authority on behalf of the Board, in respect of the investigation of charges and the issuance of complaints under Section 10 ..." This provision and the other pertinent sections of the National Labor Relations Act have uniformly been interpreted to preclude judicial review of the General Counsel's processing of charges. Even prior to the 1947 amendments to the Act, in a long and unbroken line of decisions of the National Labor Relations Act, it was held that Section 10(b) vested in the Labor Board, the discretionary power to issue or withhold a complaint. In *Jacobsen* v. *NLRB*, 120 F. 2d 96 (3 Cir., 1941), the Court held it was within the sound discretion of the Board whether or not it should issue a complaint. The 1947 amendments to the Act did not change the language of Section 10(b) and the same rule, as applied with the Board, should apply to the General Counsel.[1]

In 1948, the United States Court of Appeals for the First Circuit, in *Lincourt* v. *NLRB*, 170 F.2d 306, gave its think-

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[1] *Wellington Mill Div., West Point Mfg. Co.* v. *N.L.R.B.*, 330 F. 2d 579, 590 (C.A. 4, 1964), *cert. denied*, 379 U.S. 882; *Contractor's Ass'n of Phila, et al.* v. *N.L.R.B.*, 295 F. 2d 526 (C.A. 3, 1961), *cert. denied*, 369 U.S. 813; *Dunn* v. *Retail Clerks Local 1529*, 307 F. 2d 285 (C.A. 6, 1962); *Balanyi* v. *Local 1031, IBEW & N.L.R.B.*, 376 F. 2d 723 (C.A. 7, 1967); *United Electrical Contractor's Ass'n* v. *Ordman*, 366 F. 2d 776 (C.A. 2, 1962), *cert. denied*, 382 U.S. 1028; *Division 1267, Amal. Ass'n, etc.* v. *Ordman*, 320 F. 2d 729 (C.A.D.C., 1963); *N.L.R.B.* v. *Lewis*, 310 F. 2d 364, 366 (C.A. 7, 1962); *Retail Store Employees Union Local 954* v. *Rothman*, 298 F. 2d 330, 331-332 (C.A.D.C., 1960); *cert. denied*, 364 U.S. 909; *Kaufman* v. *Rothman*, 278 F. 2d 866 (C.A.D.C., 1962); *Mayer* v. *Ordman*, 391 F. 2d 889 (C.A. 6, 1968), *cert. denied*, 393 U.S. 925; *Hourihan* v. *N.L.R.B.*, 201 F. 2d 187, 188 (C.A.D.C., 1952), *cert. denied*, 345 U.S. 930; *General Drivers, etc.* v. *N.L.R.B.*, 179 F. 2d 492, 494 (C.A. 10, 1950); *Thompson Products, Inc.* v. *N.L.R.B.*, 133 F. 2d 637, 639-640 (C.A. 6, 1942); *Drusky* v. *Shore*, Civil No. 68-124, W.D., Pa., 1968, 67 LRRM 2990.

ing on the matter, in a per curiam decision holding that the issuance of a complaint in the name of the Labor Board charging unfair labor practices was a matter of administrative discretion.

In spite of this well settled doctrine, plaintiff seeks to have this Court review and evaluate the General Counsel's decision in the instant case to refuse to issue an unfair labor practice complaint. He argues that the defendant, by accepting evidence of witnesses without plaintiff's knowledge and without affording plaintiff the opportunity of a hearing to examine and cross examine evidence and witnesses, which defendant had in its possession, and interviewed during defendant's investigation, is a denial of due process and of the rights guaranteed to plaintiff by the Constitution of the United States of America and the Administrative Procedure Act (5 U.S.C.A. 554 et seq.), and an improper and illegal mixing of the judicial and administrative functions.

However, these alleged irregularities fail to provide a basis for district court jurisdiction. Indeed, the Courts have rejected attempts to supervise the manner in which the general counsel exercises his statutory authority. In *Mayer* v. *Ordman*, 391 F. 2d 889, (C.A. 6, 1968), *cert. denied*, 393 U.S. 925, the Court stated at page 891:

> "The cases are clear that Congress has provided an administrative tribunal, the National Labor Relations Board, to administer the Labor Acts and that, other than final orders from the NLRB, which are appealable to the United States Court of Appeals, the power of the Board in disputes between labor and management is exclusive .... Plaintiff's reliance on the grant of general jurisdiction, the Constitution and the Administrative Procedure Act, and the Declaratory Judgments Act, are not sufficient. A review by the Federal District Courts is not always necessary to preserve or

protect rights created by Congress. *Switchmen's Union of North America* v. *National Mediation Board*, 320 U.S. 297, 64 S. Ct. 95, 88 L. Ed. 61 (1943). Congress is entitled to determine the remedy it will provide, the extent to which it should be accorded and the means by which it should be made effective. *Amalgamated Utility Workers* v. *Consolidated Edison Co.*, 309 U.S. 261 (1940)."

Thus, plaintiff's reliance on the Administrative Procedure Act (5 U.S.C. 554, et seq.), as a ground for involving this Court's jurisdiction, is misplaced. As the Court of Appeals for the Third Circuit concluded in *Local 542, International Union of Operating Engineers* v. *N.L.R.B.*, 328 F. 2d 850 (C.A. 3, 1964), *cert. den.*, 379 U.S. 826:

"There is nothing in Section 10 or any clause of the Administrative Procedure Act which extends the jurisdiction of either the district courts or the appellate courts to cases not otherwise within their competence."

In addition, Section 10 of the Administrative Procedure Act, (5 U.S.C. Sec. 701(a)(2), specially excepts from its coverage "agency action which is committed to agency discretion by law".[2]

Thus, the question of whether the General Counsel should issue an unfair labor practice complaint in a particular case is by law committed to his discretion.

In the case of *Mayer* v. *Ordman* (supra), and with regard to plaintiff's assertion of violation of his constitutional

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[2] In a statement appended to the Senate Committee Report on the Administrative Procedure Act, the Attorney General noted that Section 10 of the A.P.A. did not provide for judicial review of "matters committed partly or wholly to agency discretion such as the refusal of the Board to issue an unfair labor practice complaint." S. Rep. No. 752, 79th Congress 1st Sess. 43; Administrative Procedure Act—Legislative Hist.; Sen. Document No. 248, 79th Congress, 2nd Sess. 229-30, (G.P.O., 1946).

rights by virtue of deprivation of property without due process, the Court stated at the end of page 892:

> "It is clear that the rights plaintiffs seek to enforce are statutory rights created expressly by Congress, and not constitutional rights. Plaintiff has no constitutional right to a Board action in his behalf. This is a statutory remedy provided for the public benefit to be applied in the discretion of the General Counsel."

Similarly, in *Dunn* v. *Retail Clerks, Local 1529*, 307 F.2d 285, (C.A. 6, 1962), the Court considered itself without jurisdiction to remedy alleged inadequacies in the General Counsel's investigation of an unfair labor practice charge. The Court there noted that it was "foreclosed . . . from entrance by judicial writ into such a situation" and that it would have to "leave an injured party to the assistance of those empowered to apply administrative remedies or executive correction."

Plaintiff cites the Supreme Court's decision of *Leedom* v. *Kyne*, 358 U.S. 184 (1958) and the Second Circuit's decision in *Fay* v. *Douds*, 172 F. 2d 720 as indicative of a trend of the courts to afford a remedy, apart from the review provisions of the Wagner Act, upon a showing that unlawful action of the Board has inflicted injury to a petitioner. But these cases have authorized district courts intervention only in the extraordinary situation where the Board's action violated an express statutory mandate (*Leedom* v. *Kyne*, supra), or resulted in the deprivation of a substantial constitutional right.

Thus, the Supreme Court in *Leedom* v. *Kyne* (supra), states at page 188:

> "This suit is not one to review in the sense of that term as used in the Act, a decision of the Board made within its jurisdiction. Rather, it is one to strike down an order of the Board made in excess of its

delegated powers and contrary to a specific prohibition in the Act." It should also be noted by plaintiff that the cases of *Leedom* v. *Kyne*, supra, and *Fay* v. *Douds*, supra, were specifically directed at Board action in Section 9 representation proceedings and have never been extended to apply to the issuance of unfair labor practice complaints under Section 8 and 10.

Finally, the plaintiff in trying to convince the Court that he has been deprived of statutory rights protected by the Constitution, cites the recent case of *Motor Coach Employees* v. *Lockridge*, (June 1971), 29 L. Ed. 2d 473, — U.S. —, 91 S. Ct., where Justice Douglas in the dissenting opinion at 29 L. Ed. 2d 493, footnote 2, states:

"Since we have yet to rule on the reviewability of the refusal of the General Counsel to act, that route might be open although at present the authority is to the contrary."

While this Court is fully aware that the case law is strongly against the general contentions urged by the plaintiff, we also recognize that the law in this area is in a state of flux. What petitioner seeks, however, is not only that we accept the newer doctrine, but that we extend it to a case in which the factual basis does not merit it since, as fully detailed in the General Counsel's decision to sustain the Regional Director's dismissal of the charge, there was ample evidence disclosed by the investigation to support the conclusion that plaintiff was a supervisor not protected by Section 8(a)(3) and (1) of the Act.

For the reasons set forth in the foregoing findings of fact and conclusions of law, the complaint herein is dismissed and the requested discovery becomes moot and abate. A separate judgment will be entered accordingly.

San Juan, Puerto Rico, December 2, 1971.

(s) JOSE V. TOLEDO
U. S. District Judge

APPENDIX C

NATIONAL LABOR RELATIONS BOARD
[SEAL] OFFICE OF THE GENERAL COUNSEL
Washington, D. C. 20570

Re: Sea-Land Service, Inc.
Case No. 24-CA-2281

[Letters to Parties forwarded via certified mail this date]
/s/ SAB

George L. Wessler, Esq.
P.O. Box 9698
Santurce, Puerto Rico 00908

Dear Mr. Wessler:

Your appeal in the above matter has been duly considered.

The appeal is denied. Essentially for the reasons set forth in the Regional Director's letter of February 26, 1971, Saez' discharge under the circumstances disclosed did not constitute an unfair labor practice.

In determining that Saez was a supervisor within the meaning of Section 2(11) of the Act Saez' two affidavits dated February 8 and 17, 1971, disclosed the following: Saez had a supervisory title. He was "in charge of" between 14 and 16 employees. He daily "determined the number of men to be used..." and "assigned" them to their place of work. He "check[ed]" the "utilities" work and "resolv[ed] any doubt they might have." He decided which equipment that the "utilities" in the nonwarehouse area were working on was serviceable and which needed shop repair. He performed no "utility" work and a "very insignificant" amount of "inspection work." He "prepare[d]" employee reports, such as the employees' time

worked on each assignment. He "authorized" some employees "to leave without consulting [his superior]." He has transferred "a utility from [his] gang to another gang, if requested by another 'supervisor'." He has issued "verbal warnings to employees if they don't perform their jobs . . ." He has "reject[ed] employees that were unsatisfactory." When he was absent, *only* one of the other five "supervisors" replaced him. When the Company called a "supervisor" meeting, only the six "supervisors", in addition to their superiors, attended the meeting. The Company paid him on a salaried basis by check every two weeks, which is contrary to the appeal's contention, and did not require him to punch a timecard. In contrast, the Company paid his men on an hourly basis in cash every week and required them to punch in. And finally, contrary to the appeal's contention, when a grievance arose, the union steward was "supposed to come to [him]", and did actually discuss the grievance with him "casually", even though, in practice, the steward contacted another union official or his superiors.

Very truly yours,
ARNOLD ORDMAN
General Counsel
By /s/ IRVING M. HERMAN
Director, Office of Appeals

cc: Director, Region 24
Mr. Josue N. Saez, Gaudalupe 26, El Alamo, Guaynabo, Puerto Rico 00657
Sea-Land Service, Inc., GPO Box 2648, San Juan, Puerto Rico 00936
Donald M. Hall, Esq., GPO Box 4225, San Juan, Puerto Rico 00936
CERTIFIED MAIL

Appeal from the refusal to issue complaint based on an 8(a)(1) and (3) charge filed on February 8, 1971, by Josue'

N. Sass, an individual, alleging that about February 5, 1971, the Company had discharged him because of union activities.

APPENDIX B

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO

Civil No. 574-71

JOSUE N. SAEZ,
PLAINTIFF,
v.
EUGENE G. GOSLEE,
as Acting General Counsel of the
National Labor Relations Board,
DEFENDANT.

AMENDED COMPLAINT FOR INJUNCTION

To the Honorable Court:

Comes now the plaintiff through his undersigned counsel and alleges complains and prays as follows:

1— Plaintiff, Josue N. Saez, is a citizen of the United States and a resident of the Commonwealth of Puerto Rico.

2— Defendant Eugene G. Goslee was Acting General Counsel of the National Labor Relations Board at the commencement of this proceeding. Since commencement of this proceeding defendant Peter Nash has been confirmed by the United States Senate and holds office as the General Counsel of the National Labor Relations Board, herein Labor Board, by virtue of Section 3(d) of the National Labor Relations Act, herein Act, 29 USCA 153(d). Defendant Goslee and defendant Nash are herein jointly and severally called General Counsel.

3— General Counsel, by virtue of Section 3(d) of the Act, 29 USCA 153(d), exercises general supervision over all attorneys of the Labor Board and over the officers and employees in the region offices of the Labor Board. The

Labor Board maintains its 24th Regional office in the City of San Juan in the Commonwealth of Puerto Rico.

4 — General Counsel, by virtue of Section 3(d) of the Act, 29 USCA 153(d), has final authority, on behalf of the Labor Board, in respect of the investigation of charges and issuance of complaints under Section 160, and in respect of the prosecution of such complaints before the Board and has such other duties as the Labor Board may prescribe or as may be provided by law.

5 — From October 1, 1969 until February 6, 1971, plaintiff was an "employee" within the meaning of Section 2(3) of the Act, 152 USCA 152 (3), and as such was employed by Sealand Service, Inc. in the Commonwealth of Puerto Rico. Sealand Service, Inc. is an "employer" within the meaning of Section 2 (2) of the Act, 29 USCA 152 (2), and engaged in "commerce" within the meaning of Section 2 (6) of the Act, 29 USCA 152 (6).

6 — Prior to February 6, 1971 plaintiff was actively engaged in union and concerted activities on behalf of Office Employees International Union—Local 402 affiliated with Office and Professional Employees International Union, herein Union, which is a "labor organization" within the meaning of Section 2 (5) of the Act, 29 USCA 152 (5).

7 — On or about February 6, 1971, Plaintiff was discharged by the employer because of his activities for and on behalf of and his membership in the union in violation of his statutory rights guaranteed in Section 7, 29 USCA 157, and in violation of Sections 8(a)(1) and (3) of the Act. 29 USCA 158 (1) and (3).

8 — On February 8, 1971 plaintiff filed an unfair labor practice charge, with the regional office of the Labor Board, against his employer, alleging his discriminatory and illegal discharge in violation of Section 8(a)(1) and (3) of the Act. 29 USCA 158 (1) and (3). A copy of said charge is attached hereto as Exhibit A.

9—On February 8, 1971 and again on February 17, 1971, plaintiff at the request of an employee of the General Counsel gave affidavits concerning the circumstances surrounding his activities on behalf of the union and his discharge by the employer. On neither occasion was plaintiff advised of his statutory rights under the Act nor of his constitutional rights to a hearing and representation by counsel.

10—On February 26, 1971, the regional director of the Board on behalf of the General Counsel, advised plaintiff he was refusing to issue a complaint on the grounds plaintiff was a "supervisor" within the meaning of Section 2(1) of the Act, 29 USCA 152 (6), and thus not included within the definition of "employees" within the meaning of the Act. A copy of said letter is attached hereto as Exhibit B.

11—On information and belief, plaintiff alleges that between February 8, 1971 and February 26, 1971, representatives of the General Counsel contacted and made inquiry of agents of the employer as to the merits of the charge filed by plaintiff. At no time since filing of said charges has the General Counsel allowed the plaintiff the opportunity of cross-examining said evidence supplied by the employer but at all times material herein has failed and refused to allow plaintiff an opportunity to examine or question such evidence.

12—On March 5, 1971, plaintiff made a timely appeal to the General Counsel from the regional director's refusal to issue complaint. In said appeal, among other things, plaintiff protested the regional director's failure to comply with Section 101.6 of the Board's Rules and Regulations and requested that plaintiff be given the constitutional right of procedural due process in having a hearing. A copy of said appeal is attached hereto as Exhibit C.

13—On April 1, 1971, representatives of the General

Counsel advised plaintiff, and representatives of the employer that the appeal of plaintiff was denied.

14 — On information and belief, plaintiff alleges that the decision of the General Counsel in sustaining the decision of the regional director not to issue complaint was based on information and evidence submitted by the employer to the regional director and to which information and evidence plaintiff was denied the opportunity to examine and challenge.

15 — Plaintiff has exhausted his administrative remedies under the National Labor Relations Act.

16 — This Court has jurisdiction over the parties and the subject matter of this proceeding by virtue of 28 USCA 1337; 5 USCA 1001 et seq. (Administrative Procedure Act; 28 USCA Sec. 1391(e) and Federal Rules of Civil Procedure, rule 4(d), 28 USCA.

17 — The refusal and failure of the General Counsel to allow and grant plaintiff a hearing on his statutory rights as an "employee", as granted by the Act; defendant's making an investigation of the charges filed by soliciting and accepting evidence of witnesses without the knowledge of plaintiff or the right of plaintiff to be present or of confrontation and cross-examination; defendant's failure to advise plaintiff that his constitutional rights were concerned and of his right to have counsel during said investigation, were a denial of due process and of the rights guaranteed plaintiff by the Constitution and the Act and the Administrative Procedure Act (5 USCA 554, et seq.) and an improper and illegal mixing of the judicial and administrative functions.

18 — Defendant, by determining plaintiff is not an "employee" within the meaning of the Act, has engaged in an illegal and unwarranted usurping of the judicial function of the Labor Board and acted beyond the administrative duties and functions conferred upon him by law.

The defendant, by refusing to issue complaint so that plaintiff may have his status as an "employee" determined by the Board under all the circumstances is an abuse of discretion and a denial to plaintiff of due process of law.

Wherefore, Plaintiff prays for an order and judgment of this court requiring defendant to issue complaint so that plaintiff's statutory rights as an "employee" may be determined and that plaintiff be granted the costs of this proceeding.

Dated this 27 day of September, 1971, Santurce, Puerto Rico.

(s) GEORGE L. WRAESLER
GEORGE L. WRAESLER and
PEDRO E. PURCELL RUIZ
Attorneys for Plaintiff
607 Condominio Condado
P.O. Box 9898
Santurce, Puerto Rico 00908

APPENDIX B

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO

Civil No. 574-71

JOSUE N. SAEZ,
PLAINTIFF,

v.

EUGENE G. GOSLEE,
as Acting General Counsel of the
National Labor Relations Board,
DEFENDANT.

MOTION OF DEFENDANT TO DISMISS THE COMPLAINT

Defendant moves that the complaint herein be dismissed under rule 12 (b) of the Federal Rules of Civil Procedure on the grounds that this Court lacks jurisdiction over the subject matter of this action; and the complaint fails to state a claim upon which relief can be granted.

WHEREFORE, defendant respectfully prays that the complaint be dismissed.

MARCEL MALLET-PREVOST
Assistant General Counsel
National Labor Relations Board

By
GLEN M. BERNDEN
Chief of Special Litigation
Washington, D.C. 20570
Telephone: (202) 382-5401

Dated at Washington, D.C.
this 15th day of September 1971

Co-counsel: STEPHEN SOLOMON
(Ext. 5524)
and
VICENT M. ROTOLO,
Regional Attorney, Region 24,
National Labor Relations Board
255 Ponce de Leon Avenue
Hato Rey, Puerto Rico 00919
Telephone: (106) 622-0475

APPENDIX F

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO

Civil No. 874-71

JOSUE N. SAEZ,
PLAINTIFF,
v.
EUGENE G. GOSLEE,
as Acting General Counsel of the
National Labor Relations Board,
DEFENDANT.

MOTION OF PLAINTIFF FOR SUMMARY JUDGMENT

To the Honorable Court:

Comes now the plaintiff through his undersigned attorneys and alleges, moves and prays as follows:

1 — This proceeding was commenced with the filing of a complaint for injunction against defendant alleging that defendant had deprived plaintiff of certain statutory rights as an "employee" under the National Labor Relations Act in violation of due process under the Constitution in that defendant failed and refused to grant plaintiff a hearing before defendant determined plaintiff was not entitled to the protection of the National Labor Relations Act.

2 — Defendant filed a motion to dismiss the complaint on the grounds this court has no jurisdiction over the subject matter of this proceeding.

3 — As more fully set forth in the complaint and attachments whereto and plaintiff's affidavit annexed hereto, it is clear that:

a — The National Labor Relations Act has created certain public rights for those persons classified by the Act as "employees".

b — Defendant has determined that plaintiff is not an "employee" within the meaning of the Act without advising plaintiff of his rights to have advice of counsel and without affording plaintiff the opportunity of a hearing to examine and cross-examine evidence and witnesses which defendant has in its possession and interviewed during defendant's investigation.

c — The action and conduct of the defendant has deprived plaintiff of statutory rights without procedural due process of law and in violation of the Constitution of the United States.

Wherefore, plaintiff prays that defendant's motion to dismiss be denied, this motion for summary judgment be granted and that plaintiff be granted the relief prayed for in his complaint.

Dated at Santurce, Puerto Rico
this 27th day of September, 1971.

Respectfully submitted,

(s) George L. Wrasler
George L. Wrasler and
Pedro E. Purcell Ruiz
Attorneys for Plaintiff
607 Condominio Condado
P.O. Box 9898
Santurce, Puerto Rico 00908

APPENDIX C

[Letterhead — N.L.R.B., Office of the General Counsel]

February 26, 1971

Re: Sea-Land Service, Inc.
Case No. 24-CA-2981

Mr. Josue N. Saez
Guadalupe 26, El Alamo
Guaynabo, Puerto Rico 00657

Dear Sir:

The above-captioned case charging a violation under Section 8 of the National Labor Relations Act, as amended, has been carefully investigated and considered.

Investigation of the above charge has failed to reveal evidence that your employment was terminated by the above-named employer on February 6, 1971 in violation of Section 8 (a) (1) and (3) of the National Labor Relations Act.

The investigation reveals that at the time of your discharge you were a supervisor of the company. Assuming without deciding that you were engaged in union activities and that you were discharged for said activities, the Act does not protect you since supervisors are not included in the definition of "employees" who have the protection of Sections 8 (a) (1) and (3) of the Act. I am, therefore, refusing to issue a complaint in this matter.

Pursuant to the National Labor Relations Board Rules and Regulations, you may obtain a review of this action by filing an appeal with the General Counsel of the National Labor Relations Board, Washington, D.C. 20570 and a copy with me. This appeal must contain a complete statement setting forth the facts and reasons upon which it is based. The appeal must be received by the General Counsel in Washington, D.C., by the close of business on March 11,

1971. Upon good cause shown, however, the General Counsel may grant special permission for a longer period within which to file. A copy of any such request for extension of time should be submitted to me.

If you file an appeal, please complete the notice forms I have enclosed with this letter and send one copy of the form to each of the other parties. Their names and addresses are listed below. The notice forms should be mailed at the same time you file the appeal, but mailing the notice forms does not relieve you of the necessity for filing the appeal itself with the General Counsel and a copy of the appeal with the Regional Director within the time stated above.

Very truly yours,
(s) RAYMOND J. COMPTON
Regional Director

APPENDIX B

law offices
GEORGE L. WEAVER
P.O. Box 9898
Santurce, Puerto Rico 00908

March 5, 1971

Office of the General Counsel
National Labor Relations Board
Washington, D. C.

Re: Sea Land Service, Inc.
24-CA-2981

Dear Sirs:

This is an appeal from the Regional Director's refusal to issue complaint. The Director's decision is based on the legal conclusion that Josue N. Saez was a "supervisor" within the meaning of the Act. Without at least "a simple statement of the grounds therefor" as seems indicated by Section 101.6 of the Board's Rules and Regulations, we are uninformed of the rationale behind the dismissal of the charge and being required to submit "a complete statement setting forth the facts and reasons upon which it is based," to support this appeal, the charging party faces an awesome, if not unsurmountable task.

The facts within our knowledge indicates that Mr. Saez meet none of the criteria for establishing a supervisory status unless the bare title of maintenance "supervisor", bestowed by his employer for obvious reasons, can, standing by itself, remove Mr. Saez from the protection of the right to engage in concerted or union activities which the Regional Director half-heartedly concedes Mr. Saez did.

Fifteen or Sixteen employees work in Mr. Saez department in inspecting equipment, lights, tires, safety features,

etc. (The number of employees varies depending on the amount of work but Saez has no say in such matter.) The men working in this Department are selected, when needed, are selected by use of a seniority list compiled by the Employer and their union the ILA. (This union is not involved in this proceeding). In the event an employe does not show up for work when his turn is reached on the seniority roster, the garage manager or his assistant selecty the next man available from such list. Saez can not determine whether overtime shall be worked this is determined by Trailer Control which sets up an overtime budget, and the specific employees allowed overtime are also selected from the employer-ILA lists. Most of the workers make considerable more money than Saez, in many cases running over $100.00 a week more. This is true, of course, because of overtime but is also true because of their high hourly rat as compared with Saez weekly salary. Regular employees get three weeks vacation a year—Saez receives two weeks; their respective sick-leave is almost the same. Workers with a "gripe" take it directly to their shop steward and then to the manager—never to Saez. Saez has no authority to promote, demote or recommend either. Saez does replace the real supervisor when the latter is absent. Saez spend a little time on physical work and a little time fiddling with forms but most of his time is spent with the men watching their progress during inspection.

For your general information, in another department, the Board ordered an election among the "coordinators" who previously had worn the appelation of "supervisors". For want of a better name, waterfront "hatch tenders" were called "Foremen" or "Supervisors" until the latter were specifically amended out of the Act's protection.

Mr. Saes is about as much a "supervisor" as one of your Grade 13 or 14 "supervisors" in your regional offices.

For all of the above reasons we ask that the regional director's dismissal be reversed and that Saes be given his day in court.

Sincerely,

(s) GEORGE L. WRAGLEN

GLW/re

cc: Raymond J. Compton, Esq.

APPENDIX I

The relevant portions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, et seq.), are as follows:

* * *

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a)(3).

Sec. 8(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * *

(3) by discrimination in regard to hire or tenure of employment to encourage or discourage membership in any labor organization. . . .

APPENDIX J

The relevant portion of the Rules and Regulations and Statements of Procedure, series 8, as amended is as follows:

Sec. 102.19 Appeal to the general counsel from refusal to issue or reissue. — (a) If, after the charge has been filed, the regional director declines to issue a complaint, or having withdrawn a complaint pursuant to section 102.18, refuses to reissue it, he shall so advise the parties in writing, accompanied by a simple statement of the procedural or other grounds for his action. The person making the charge may obtain a review of such action by filing an appeal with the general counsel in Washington, D. C., and filing a copy of the appeal with the regional director, within 10 days from the service of the notice of such refusal to issue or reissue by the regional director, except as a shorter period is provided by section 102.81. The appeal shall contain a complete statement setting forth the facts and reasons upon which it is based. A request for extension of time to file an appeal shall be in writing and be received by the general counsel, and a copy of such request filed with the regional director, prior to the expiration of the filing period. Copy of the acknowledgment of the filing of an appeal and of any ruling on a request for an extension of time for the filing of an appeal shall be served on all parties. Consideration of an appeal untimely filed is within the discretion of the general counsel upon good cause shown.

(b) Oral presentation in Washington, D. C., of the appeal issues may be permitted a party on written request made within 4 days after service of acknowledgment of the filing of an appeal. In the event such request is granted, the other parties shall be notified and afforded, without

additional request, a like opportunity at another appropriate time.

(c) The general counsel may sustain the regional director's refusal to issue or reissue a complaint, stating the grounds of his affirmance, or may direct the regional director to take further action; the general counsel's decision shall be served on all the parties. A motion for reconsideration of the decision must be filed within 10 days of service of the decision, except as hereinafter provided, and shall state with particularity the error requiring reconsideration. A motion for reconsideration based upon newly discovered evidence which has become available only since the decision on appeal shall be filed promptly on discovery of such evidence.

APPENDIX K

Relevant part of the National Labor Relations Board Manual:

INITIAL NOTICES 10040.5

10040.5 Right to counsel and notice of appearance: The initial letters to the parties should be accompanied by Forms 4541 and 4701. NLRB-4541 advises participants of the right to be represented by counsel and summarizes the Board's procedures with respect to the charge. Form 4701, Notice of Appearance, is for convenience of parties to notify the Agency of the name and address of counsel or other representative on their behalf. The form may be used at any stage of the case.

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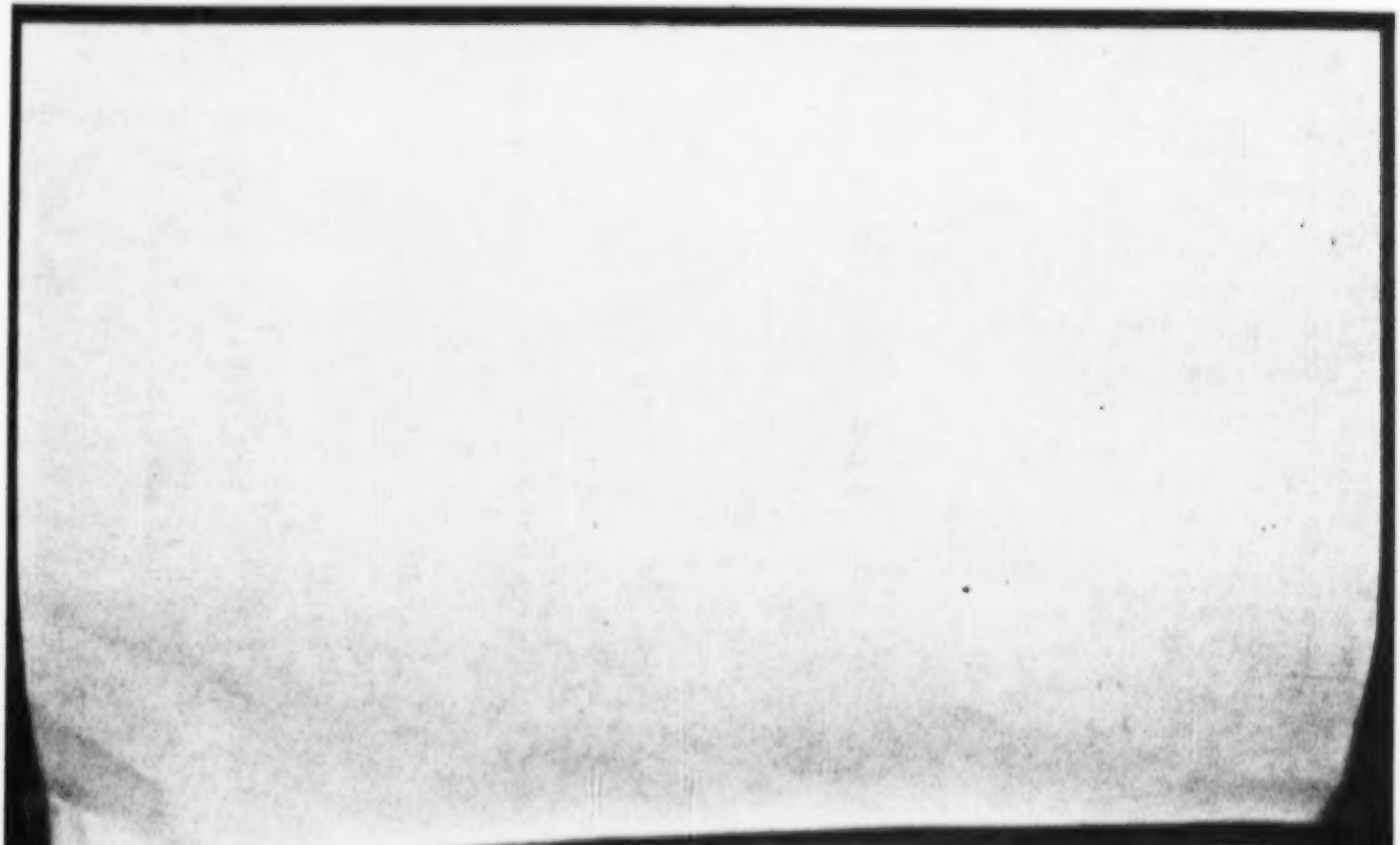

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-440

JOSUE N. SAEZ, PETITIONER

v.

EUGENE G. GOSLEE, as Acting General Counsel and/or PETER G. NASH, General Counsel of the National Labor Relations Board

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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1. On February 8, 1971, petitioner filed an unfair labor practice charge alleging that the Company[1] had terminated his employment because of his membership in and activities on behalf of the Union,[2] in violation of Section 8(a)(3) and (1) of the National

[1] Sea-Land Service, Inc.

[2] Local 402, Office and Professional Employees Union, AFL-CIO.

Labor Relations Act, 29 U.S.C. 158(a)(3) and (1). The Board's Regional Director, after an administrative investigation, concluded that petitioner was a "supervisor" within the meaning of Section 2(11) of the Act, 29 U.S.C. 152(11), at the time of his discharge and, therefore, was not protected by the statute; accordingly, he refused to issue a complaint on the charge (Pet. App. 40-41). Pursuant to the procedure provided by the Board's rules (Pet. App. 46-47), petitioner appealed to the General Counsel of the Board (Pet. App. 42-44). The General Counsel, relying on two affidavits given by petitioner during the course of the Regional Director's investigation of the charge, upheld the Director's determination that petitioner was a supervisor and denied the appeal (Pet. App. 28-30).

Petitioner filed suit in the United States District Court for the District of Puerto Rico, seeking to compel the General Counsel to issue an unfair labor practice complaint based upon his charge (Pet. App. 31-37). On December 2, 1971, on motion of the General Counsel, the district court dismissed the action on the ground that it lacked jurisdiction to review the General Counsel's refusal to issue a complaint (Pet. App. 19, 23-27).[2] The court of appeals affirmed (Pet. App. 15-18).

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[2] The District Court added that, "as fully detailed in the General Counsel's decision to sustain the Regional Director's dismissal of the charge, there was ample evidence disclosed by the investigation to support the conclusion that plaintiff was a supervisor not protected by Section 8(a)(3) and (1) of the Act" (Pet. App. 27).

2. Section 3(d) of the Act, 29 U.S.C. 153(d), provides that "[t]he General Counsel of the Board * * * shall have final authority on behalf of the Board, in respect of the investigation of charges and issuance of complaints under Section 10 * * * *." As the court of appeals pointed out, "[f]or a quarter of a century this section has been uniformly interpreted to mean that federal courts have no jurisdiction to review the General Counsel's refusal" to issue a complaint (Pet. App. 16, and cases there cited).

Petitioner seeks to avoid this settled rule by arguing that the action of the General Counsel "without first providing a hearing at some stage of his investigation is a denial of procedural due process" (Pet. 2), which the district court should review. Whether the Constitution requires that the full panoply of judicial procedures be used depends upon "[t]he nature of the alleged right involved, the nature of the proceeding, and the possible burden on that proceeding." *Hannah* v. *Larche*, 363 U.S. 420, 442; see also *Cafeteria Workers* v. *McElroy*, 367 U.S. 886, 895; *Goldberg* v. *Kelly*, 397 U.S. 254, 262-263. As the court below noted, a person who files an unfair labor practice charge with the Board is not entitled "to have an unfair labor practice complaint issue in the same sense that, for example, a welfare recipient has a statutory entitlement to benefits" (Pet. App. 17; compare *Goldberg* v. *Kelly*, *supra*, 397 U.S. at 261-262). The remedies of the National Labor Relations Act protect public interests rather than merely private rights (*Amalgamated Workers* v. *Edi-*

son Co., 309 U.S. 261, 264-265). Thus the General Counsel issues an unfair labor practice complaint only when he believes such action will effectuate the policies of the Act.

Moreover, the General Counsel's determination not to issue a complaint is not akin to a formal adjudication, which normally requires the procedures traditionally associated with the judicial process, but rather to the decision of a prosecuting attorney (see 93 Cong. Rec. 6859, 2 Leg. Hist. (1947) 1623), which is usually made on the basis of an informal, fact-finding investigation. Finally, as the court of appeals noted (Pet. App. 17), "important governmental interests both fiscal and otherwise, * * * would be jeopardized should we require a hearing prior to a final decision on whether to issue an unfair labor practice complaint." For these reasons, the procedure followed by the General Counsel in this case was proper and did not deprive petitioner of due process of law. See also *Braden* v. *Herman*, C.A. 8, No. 72-1054, decided October 5, 1972.

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

PETER G. NASH,
General Counsel,
National Labor Relations Board.

OCTOBER 1972.

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